IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

MONDAY, THE 9TH JULY 2007 / 18TH ASHADHA 1929

WA.No. 1238 of 2007()

AGAINST THE JUDGEMENT IN OP.6531/2001 Dated 30/03/2006
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APPELLANT: RESPONDENTS 1 TO 3 IN THE O.P
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1. STATE OF KERALA, REPRESENTED BY THE SECRETARY TO GOVERNMENT, GENERAL EDUCATION DEPARTMENT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF PUBLIC INSTRUCTIONS, THIRUVANANTHAPURAM.

3. THE ASSISTANT EDUCATIONAL OFFICER, CHAVAKKAD, THRISSUR DISTRICT.

BY GOVERNMENT PLEADER SRI. SANDESH RAJA

RESPONDENT: PETITIONER IN THE O.P

P.K.ZAINUDEEN, UPPER DIVISION CLERK, ASSISTANT EDUCATIONAL OFFICE, CHAVAKKAD, THRISSUR DISTRICT.

BY SRI. N.P.SAMUEL

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 29/06/2007, THE COURT ON 9/7/2007 DELIVERED THE FOLLOWING:

K.S.Radhakrishnan
&
Antony Dominic, JJ.
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W.A.No.1238 of 2007
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Dated this the 9th day of July, 2007.

JUDGMENT

Antony Dominic,J.

Writ Petition was filed by the first respondent praying for a direction to the appellants to grant the time bound first higher grade with effect from 16.9.1985, the second time bound higher grade with effect from 3.1.1995 and third higher grade with effect 3.1.1998. Writ Petition was allowed by a learned single Judge following the judgment in the case of **K.S.R.T.C.** v. **Noorudeenkutty** – 2005(3) K.L.T. 504. Aggrieved by the same, the respondents have come up with this appeal.

2. First respondent had joined duty in the Education Department

as L.D.C. on 3.1.1975 and availed of leave without allowance for the period from 17.8.1978 to 18.8.1983 for taking up employment abroad. Ext.P1 is the Government Order sanctioning such leave. It is clear from Ext.P1 that the leave so granted was subject to the conditions in G.O.(P) No.274/70/Fin dated 29.4.1970, G.O.(P) No.65/76/Fin dated 25.2.1976 and the guidelines issued in circular No.117546/SD3/76/GAD dated 19.5.1977 and subject to further conditions that the period of leave would not count for pension or any other service benefits and this fact was recorded in his service book. The period of leave was thereafter extended till 18.8.1988 and before the expiry of the said period, first respondent re-joined duty on 3.11.1986. Thereafter, he claimed that the aforesaid period of leave should be reckoned for sanctioning time bound higher grades and this was considered by the appellants and by Ext.P7 order, he was informed that the period of leave availed of by him for employment abroad would not be reckoned for granting higher grades and that he was eligible for higher grade excluding the period of leave without allowance availed of by him. Original Petition was therefore filed to quash Ext.P7 and also for other reliefs mentioned above.

3. Appellants contended that while granting leave without allowance, it was clarified by the Government in Ext.P1 order that the

period of leave would not count for pension or any other service benefits. Further it was contended that the claim for higher grade was a service benefit which had been specifically excluded in Ext.P1 and therefore the first respondent could not claim the same. It was also contended referring to Annexure A 1 G.O.(Ms) No.68/72/G.Edn. dated 2.5.1972 that Government had ordered that leave on loss of pay which was sanctioned on specific condition that it would not count for pension as well as for sanctioning higher scales of pay. Government Pleader also made reference to Annexure A2, G.O.(P) No.828/81(397)/Fin dated 9.12.1981 whereby, Government had clarified that except the leave without allowances availed of by the officers for taking up appointments outside Government service and also that availed of by female officers for accompanying their husbands abroad, all other kinds of leave without allowances will be reckoned as qualifying service for computing the 13 years service for grade promotion.

4. Counsel for the petitioner also made reference to Ext.P2 Government Order dated 29th April, 1970, which provides that leave without allowance, if any, granted will not be counted for pension and according to him, it is reiterated in Ext.P3 dated 19.5.1977 also. He would therefore contend that in the light of Exts.P2 and P3 Government Orders the condition in Ext.P1 that the period of leave will

be excluded for any other service benefits is of no consequence in as much as what is not allowed to be excluded by rules, could not have been excluded by a Government Order. Counsel also made reference to the decision of this Court reported in **K.S.R.T.C.** v. **Noorudeenkutty** – 2005(3) K.L.T. 504.

5. We have heard counsel on either side and have considered their submissions. Reference to Ext.P1 would show that specific provision has been made therein that the period of leave without allowance availed of by the petitioner would not count for pension or any other service benefits. The purport of the expression "any other service benefits", has come up for consideration before this Court in the case of **Dr.Krishna Pillai** v. **State of Kerala** – 1988 (2) K.L.T. 106. That was a case in which leave without allowance was granted, with an identical condition and dealing with a claim made for reckoning the period for promotion, this Court held as follows:

> "Having regard to the express conditions imposed at the time of granting leave as incorporated in Ext.P1 which we have extracted above, it is clear that the period during which the appellant was on leave for taking up employment abroad cannot count for 'increment, pension or any other service benefits'. The expression 'any other service benefits' includes the benefit of service rendered during the period of absence. Hence on the language of

> Ext.P1 it is obvious that the appellant having secured leave subject to certain conditions after having taken advantage of the said order Ext.P1 cannot now turn round and try to wriggle out of the conditions that were imposed by Ext.P1 of denying him the service benefits during the period of his absence."

Following the said judgment of the Division Bench, another Division Bench of this Court in the case of **Secretary to Government** v. **Jayaprakash** – 2004(2) K.L.T. SN. 16 held as follows:

> "Leave without allowances was granted to the respondent for five years subject to the condition that the period of leave will not count for pension or any other service benefit. In view of this express condition imposed at the time of granting leave, as incorporated in Ext.P1, we have no doubt in our mind that the period during which the respondent was on leave for taking up employment abroad cannot count for "pension or any other service benefits". The period spent on leave without allowances shall be treated as 'dies non' for all kinds of service benefits including pension. When the leave period is excluded, it is clear that the respondent completed 25 years of service only in March 2002. In this view of matter, he was not eligible at the time when the select list was prepared by the Departmental Promotion Committee in November 2000. No fault can, thus, be found with the action of the appellants in not including the name of the respondent in the select list.

In the light of these two judgments rendered by two Division Benches of this Court, we are of the view that the petitioner is not entitled to claim that the period spent by him on leave without allowance should be reckoned for granting higher grade or any other purpose.

6. Judgment of this Court in **K.S.R.T.C.** v. **Noorudeenkutty** – 2005(3) K.L.T. 504 is clearly distinguishable on facts. It is not clear whether a condition that the period will be excluded for any other service benefits was incorporated in the order granting leave in that case. A contention to that effect was also seen not raised before the Division Bench. **Noorudeenkutty's Case** is therefore of no assistance to the first respondent. Further, the first respondent has also not raised any prayer in the Writ Petition seeking to challenge the conditions incorporated in Ext.P1. Since leave without allowance was granted by Ext.P1 with the conditions mentioned above and in the absence of any challenge to any of the conditions incorporated therein, the first respondent is bound by the conditions in Ext.P1. In that view of the matter also, the writ petitioner is not entitled to the reliefs sought for.

4. For the aforesaid reasons, we hold that the first respondent is not entitled to have the period of leave without allowance availed of by

him reckoned for the purpose of higher grade. Learned single Judge, in our view, was not right in allowing the Writ Petition. Accordingly, the judgment of the learned single Judge is set aside and the appeal is allowed, without any order as to costs.

K.S.Radhakrishnan,
Judge.

Antony Dominic,
Judge.

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